SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC., APPELLANT,

vs.

PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Notices of appeal to Appellate Division	2	2
Copy of first information filed July 24, 1946	5	3
Copy of second information filed July 24, 1946	6	4
Endorsements on informations	7	5
Minute entries of trial and conviction	12	8
Statement of evidence	14	9
Caption and appearances	14	9
Motion to consolidate and order granting same	15	9
Motion for severance and order granting same	15	10
Motion for leave to amend information and order granting same	15	10
Testimony of Harry Kahan	16	11
Defendant's motion to dismiss	21	14
Testimony of Thomas R. Burns	22	14
Lionel Trilling	36	25
Defendant's motion to dismiss	55	38
Colloquy between Court and counsel	56	39
Decision	58	41
Stipulation as to exhibits not printed	65	46
Defendant's Exhibits:		
"B"—Advertisement	67	46
"B-1"—Advertisement	69	46
"B-2"—Advertisement	71	46
"B-3"—Advertisement	73	46
"B-4"—Advertisement	75	46

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—6595

	Original	Print
Record on appeal to Court of Appeals of New York—Continued		
Dissenting opinion, Perlman, J.	76	47
Affidavit of no majority opinion	79	48
Clerk's certificate (omitted in printing)	80	
Notice of appeal to Court of Appeals	81	49
Order of affirmance by Appellate Division	83	50
Certificate of leave to appeal to Court of Appeals	85	51
Defendant's Exhibit "A"—Translation of pages 300, 307-317 in "Memoirs of Hecate County", by Edmund Wilson	86	51
Remittitur of the Court of Appeals	98	60
Order allowing appeal	119	61
Appellant's petition for appeal, assignment of errors and prayer for reversal	121	62
Citation issued upon appeal (omitted in printing)	123	
Bond on appeal (omitted in printing)	126	
Stipulation as to record on appeal	129	64
Clerk's certificate (omitted in printing)	132	
Statement of points to be relied upon and designation of record	134	66
Order noting probable jurisdiction	137	67

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Complainant-Respondent,

against

DOUBLEDAY & COMPANY, INC., Defendant-Appellant

STATEMENT UNDER RULE 234

The District Attorney of the County of New York filed two informations in the Court of Special Sessions of the City of New York on July 24, 1946. The first information (No. 3176) contained two counts charging the defendant Doubleday & Company, Inc., with violations of Section 1141 of the Penal Law. The first count charged that defendant unlawfully gave information as to where a certain obscene book entitled "Memories of Hecate County" could be purchased; the second count in said information charged the said defendant with publishing said "Memories of Hecate County." The second information (No. 3177) charged the defendant with selling "Memories of Hecate County."

Defendant pleaded not guilty to all counts in both informations on August 8, 1946.

A trial on said informations was had before the Court (Perlman, P. J., Oliver and Farrell, J. J.) on October 27, 1946.

[fol. 2] On motion of the people, the first count (giving information) of the first information (No. 3176) was dismissed on November 27, 1946. The Court (Perlman, J., dissenting) convicted defendant under the second count (publishing) of the first information (No. 3176) and of the charge (selling) in the second information (No. 3177), and fined defendant $500 on each conviction, making a total fine of $1,000.

There has been no change in the parties.

In Court of Special Sessions of the City of New York

People of the State of New York, Complainant,

against

Doubleday & Company, Inc., Defendant

Notice of Appeal

Sirs:

Please take notice that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of conviction rendered against said defendant on November 27, 1946, in the Court of Special Sessions of the City of New York, New York County, whereby it was convicted of the crime [fol. 3] of selling a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County," and from the sentence imposed upon it on November 27, 1946, whereby it was fined the sum of $500, and from each and every part of said judgment.

Dated: December 10, 1946.

Yours, etc., Satterlee, Warfield & Stephens, Attorneys for Defendant, Office and Post Office Address: 49 Wall Street, Borough of Manhattan, New York 5, N. Y.

To: Clerk, Court of Special Sessions of the City of New York; District Attorney of New York County.

[fol. 4] In Court of Special Sessions of the City of New York

People of the State of New York, Complainant,

against

Doubleday & Company, Inc., Defendant

Notice of Appeal

Sirs:

Please take notice that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of conviction

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rendered against said defendant on November 27, 1946, in the Court of Special Sessions of the City of New York, New York County, whereby it was convicted of the crime of publishing a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County," and from the sentence imposed upon it on November 27, 1946, whereby it was fined the sum of $500, and from each and every part of said judgment.

Dated: December 10, 1946.

Yours, etc., Satterlee, Warfield & Stephens, Attorneys for Defendant, Office and Post Office Address: 49 Wall Street, Borough of Manhattan, New York 5, N. Y.

To: Clerk, Court of Special Sessions of the City of New York; District Attorney of New York County.

[fol. 5] In Court of Special Sessions of City of New York

People *v.* Doubleday

No. 3176

First Information—Filed July 24, 1946

Be it remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the crime of giving information as to how obscene book can be obtained, committed as follows:

The said defendant, on July 1, 1946, at the City of New York, in the County of New York, unlawfully did write, print, publish and utter, and cause to be written, printed, published and uttered, an advertisement and notice giving information, stating, and purporting so to do, where, how, of whom, and by what means, a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County" can be purchased, a more particular description of which said book would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given.

Second Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the crime of publishing obscene book, committed as follows:

The said defendant, on the day and in the year aforesaid, at the City and in the County aforesaid, unlawfully did print, utter, publish and manufacture a certain obscene, [fol. 6] lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County," whereof a more particular description would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given.

Frank S. Hogan, District Attorney.

In Court of Special Sessions of City of New York

People *v.* Doubleday

No. 3177

Second Information—Filed July 24, 1946

Be it remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the crime of selling obscene book, committed as follows:

The said defendant, on July 1, 1946, at the City of New York, in the County of New York, unlawfully did sell to one Harry Kahan, and did possess with intent to sell, lend, distribute, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting book, entitled "Memoirs of Hecate County", whereof a more particular description would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given.

Frank S. Hogan, District Attorney.

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[fol. 7] ENDORSEMENTS ON INFORMATION No. 3176

Cal. No. 2721.

3176

Court of Special Sessions of the City of New York, County of N. Y.

THE PEOPLE

vs.

DOUBLEDAY & Co., INC.

Information

Giving information as to how to obtain obscene book, publishing obscene book.

Frank S. Hogan, District Attorney.

Filed July 24, 1946.
Counsel .....

Adjournments:

October 14, 1946—People.
October 22, 1946—Consent.
October 29, 1946—.....

July 25, 1946 #62.

Hon. William B. Northrop, P. J.
Summons to issue returnable on August 8, 1946.

[fol. 8] August 8, 1946

Hon. Nathan D. Perlman, P. J., Hon. Irving B. Cooper.

Defendant pleads not guilty.

October 29, 1946 #30

Hon. Nathan D. Perlman, P. J., Hon. William A. Farrell, Hon. Frank Oliver, Associate Justices.

District Attorney's motion to amend information granted, Defendant not objecting (See Minutes).

On Trial—Decision reserved to November 27th, 1946.

Nathan D. Perlman, Presiding Justice.

November 27, 1946 #1

Hon. Nathan D. Perlman, P. J., Hon. William A. Farrell, Hon. Frank Oliver, Associate Justices.

On trial, Defendant Convicted on Count #2.
Justice Perlman dissents.
On Count #1—Motion of Assistant District Attorney Rogers to dismiss granted.
Fine $500.

Nathan D. Perlman, Presiding Justice.

[fol. 9] December 2nd, 1946 #30

Hon. William B. Northrop, P. J.
Fine of $500—Paid.

W. B. Northrop, Presiding Justice.

Entered in Fine Book—Page 141.
Witnesses: Harry Kahan, John S. Sumner, 215 W. 22nd St.

Endorsements on Information No. 3177

Cal. No. 2722.

3177

Court of Special Sessions of the City of New York, County of New York

The People

vs.

Doubleday & Co., Inc.

Information

Selling an obscene book.

Frank S. Hogan, District Attorney.

Filed—July 24, 1946.
Counsel.....

[fol. 10] Adjournments:

October 14, 1946—People.
October 22, 1946—Consent.
October 29, 1946—.....

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July 25, 1946 #63

Hon. W. B. Northrop, P. J.
Summons to issue returnable on August 8, 1946.

August 8, 1946

Hon. N. D. Perlman, P. J., Hon. Irving B. Cooper.
Defendant pleads not guilty.

October 29, 1946 #31

Hon. N. D. Perlman, P. J., Hon. W. A. Farrell, Hon. Frank Oliver, Associate Justices.

On trial decision reserved to Nov. 27, 1946.
Nathan D. Perlman, Presiding Justice.

Nov. 27, 1946 #2

Hon. N. D. Perlman, Presiding Justice; Hon. W. A. Farrell, Hon. Frank Oliver, Associate Justices.

[fol. 11] On trial defendant convicted.
Justice Perlman dissents (see opinion).
Fine $500.
Nathan D. Perlman, Presiding Justice.

December 2nd, 1946 #29

Hon. W. B. Northrop, P. J.
Fine of $500—Paid.
W. B. Northrop, Presiding Justice.

Entered in Fine Book—Page 141.
Witnesses: Harry Kahan, John S. Sumner, 215 W. 22nd St.

[fol. 12] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

vs.

DOUBLEDAY & CO., INC., Defendant

Docket No. 3176. Year 1946. Charge giving information as to how to obtain obscene book. Publishing obscene book.

EXTRACT FROM CLERK'S MINUTES

Present, Honorables: Perlman, Farrell, Oliver, Justices.

I do certify that it appears from an examination of the Records of this office that Doubleday & Co., Inc., the above named defendant was on trial and convicted on count #2 on November 27, 1946. Judge Perlman dissents. Fined $500. Fine Paid, On Motion of Ass't District Attorney Rogers to dismiss count #1 is hereby granted.

A true extract from the minutes.

Dated, Dec. 10, 1946.

Joseph F. Moss, Clerk of Court.

[fol. 13] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

vs.

DOUBLEDAY & CO., INC., Defendant

Docket No. 3177. Year 1946. Charge selling obscene book.

EXTRACT FROM CLERK'S MINUTES

Present, Honorables: Perlman, Farrell, Oliver, Justices.

I do certify that it appears from an examination of the Records of this office that Doubleday & Co., Inc. the above named defendant on trial and convicted on November 27, 1946 Justice Perlman dissents—See Opinion. Fined $500. Fine Paid.

A true extract from the minutes.

Dated, Dec. 10, 1946.

Joseph F. Moss, Clerk of Court.

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[fol. 14] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, PART VI—NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

DOUBLEDAY & Co., INC., Defendant

Charge: Giving information as to how to obtain obscene book; publishing obscene book.

THE PEOPLE OF THE STATE OF NEW YORK

against

DOUBLEDAY & Co., INC., Defendant

Charge: Selling obscene book.

STATEMENT OF EVIDENCE

Tried at 100 Centre Street, New York 13, N. Y. October 29, 1946.

Before Hon. Nathan D. Perlman, Presiding Justice; Hon. Frank Oliver, Hon. William A. Farrell, Associate Justices.

[fol. 15] APPEARANCES:

For the People: William P. Rogers, Esq., Assistant District Attorney, 155 Leonard Street, New York 13, N. Y.

For Defendant: Messrs. Satterlee, Warfield & Stephens, 49 Wall Street, New York, N. Y., by James F. Dwyer, Esq., and Milton Schilback, Esq., Of Counsel.

Court Clerk: Nos. 30 and 31, The People against Doubleday & Co., Inc.!

Justice Perlman: Both sides ready?

Mr. Schilback: Ready, your Honor.

MOTION TO CONSOLIDATE

Mr. Rogers: Your Honors, at this time the People move to consolidate the cases on the Calendar numbered 30 and 31, which are Information Nos. 3176 and 3177, for the purposes of the trial.

Mr. Schilback: The defendant jo-ns in the motion.

The Court: Motion is granted.

Motion for Severance

Mr. Rogers: Now, at this time, your Honors, the People move that the First Count in Information No. 3176, which count refers to the giving of information as to how an obscene book can be obtained, be severed from the other two counts; and that we proceed to trial on the two counts of selling the book and publishing the book.

Mr. Schilback: The defendant joins in the motion.

The Court: That motion is granted.

Motion for Leave to Amend Information

Mr. Rogers: Now, one further motion, your Honors.

The Information alleges in the count charging the crime of publishing an obscene book, that it was published on the same day that the book was sold, namely, July 1, 1946. The [fol. 16] People move at this time to amend that Information to allege that the publishing of the book was on March 7, 1946.

Mr. Schilback: The defendant makes no claim of surprise or variance.

Justice Perlman: Do you object to the amendment?

Mr. Schilback: No objection.

Justice Perlman: The amendment is allowed; and I think it is advisable to attach that amendment to the original information. There has been some difficulty in the past, when some of these cases were considered by an appellate tribunal, in determining just exactly what the information was. Therefore, I suggest that you type that amendment up and then attach it to the information.

Justice Oliver: Are you ready for the oath, gentlemen?

Mr. Rogers: Yes, your Honor.

Mr. Schilback: Ready.

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HARRY KAHAN, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Attendant: State your name, address, and occupation.

The Witness: Harry Kahan, Special Agent, New York Society for the Suppression of Vice, 215 West 22d Street, Borough of Manhattan.

Direct examination.

By Mr. Rogers:

Q. Mr. Kahan, you are employed by the Society for the Prevention of Vice?

A. Suppression of Vice.

[fol. 17] Q. Suppression of Vice. And how long have you been so employed?

A. The past six years.

Q. Now, July 1, 1946, did you go to premises 670 Fifth Avenue, in the County of New York?

A. I did.

Q. And what happened there?

A. I entered a store and a gentleman, supposed to be the salesman, approached me and asked me what I wanted. I said I wanted a copy of "Memoirs of Hecate County." He said, "Yes. I will get—I will gladly give it to you." He obtained a copy of "Memoirs of Hecate County," handed it to me, and asked for $2.50, plus 5 cents tax. I paid him the money and he gave me a receipt, wrapped up the book, and I left the premises.

Q. How much did you pay him?

A. Two dollars and fifty cents, plus five cents tax—$2.55.

Q. Now, I show you this book and ask you if that is the book that you purchased that day?

A. Yes.

Mr. Rogers: At this time, your Honor, I would like to enter into a concession with counsel for the defendant.

We have arranged—maybe you better state it, Mr. Schilback.

Mr. Schilback: No. Go ahead.

Justice Perlman: Is there a stipulation with respect to some testimony or proof?

Mr. Rogers: Yes, your Honor.

It is conceded, for the purposes of this trial only, that this defendant sold this book, "Memoirs of Hecate County," on July 1, 1946, in the County of New York;

Secondly, that this defendant, for the purposes of this trial only, published that book on March 7, 1946, as alleged in the information.

[fol. 18] Mr. Schilback: It is so stipulated by the defendant, for the purposes of this case, and for the purposes of this case only.

Justice Oliver: This particular defendant sitting here, or is this——

Mr. Rogers: It is a corporation, your Honor.

Mr. Schilback: The defendant is Doubleday and Company, Incorporated, the publisher of the book.

Justice Perlman: You are also stipulating that the defendant is a corporation, and does transact business in the State of New York, and, particularly, maintained the business conducted at the address given by the witness on the days in question, on the days set forth in the information? Is that the stipulation?

Mr. Schilback: It is so stipulated.

Justice Perlman: This is a book store owned by the defendant—owned and maintained and operated by the defendant?

Mr. Schilback: That is so, your Honor.

Justice Perlman: All right, sir.

Mr. Rogers: Now, your Honors, the book that was purchased has been marked. There are several markings on it. We have agreed that we would offer in evidence a copy that is unmarked. So——

Justice Oliver: Why don't you put the marked copy in?

Mr. Rogers: Well, if the Court would like it, it is all right. I thought it might be better, from the standpoint of evidence, to have an unmarked copy received.

Justice Perlman: Yes. We don't want to read anything that is marked——

[fol. 19] Justice Oliver: I do.

Justice Perlman: —by the People's witnesses.

Justice Oliver: Why not?

Justice Perlman: We have to read the entire book.

Justice Oliver: Well, the point is that the man says, "Here is something which is wrong." He points it out and you look at it.

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Mr. Schilback: The test, I submit, your Honor, is the entire book. It is not passages that may or may not have been marked after the book was purchased. The test is to read the book from the first word to the last word.

Justice Oliver: I am not objecting to that, but I say this is a lot of triviality—that it shouldn't be marked as the complainant contends. He contends that those passages, I assume, are an essential part of the entire book. I would assume that, or else there isn't any case—if it is just a line and nothing else. We all know that doesn't constitute a violation. But it doesn't make any difference to me.

Mr. Rogers: I thought it might be better from the standpoint of the law.

Justice Perlman: I think, for myself, I would prefer a clean copy, and make my own markings, if I have to. I take it that the District Attorney will, in his memorandum, if he submits any, point out what the People want (not what this witness wants) us to know. We are concerned with what the District Attorney for the People claims to be a violation of the statute. Often this witness's views have [fol. 20] not found any commendation by the Courts. So I would rather take the District Attorney's position.

Mr. Rogers: That is correct, your Honor. We will submit a memorandum at the end of this case. In that we point out the parts that we think are obscene.

Justice Oliver: It is the same thing.

Justice Perlman: That is correct.

Are you stipulating, though, while the book received by this witness may be received in evidence as the book purchased, that the Court has a copy of the book when we read it?

Mr. Schilback: The other copies that will be offered in evidence by the District Attorney, the defendant has no objection to the Court's reading them and using them as though they were the copies purchased by the witness.

Mr. Rogers: They are exact copies, is that correct?

Mr. Schilback: They are identical.

Justice Perlman: What is it—four books?

Mr. Rogers: Three, your Honor. I will offer one in evidence and then submit three.

Mr. Schilback: That is satisfactory to me.

The Court: Received in evidence as People's Exhibit 1.

(The book referred to was admitted in evidence and marked People's Exhibit 1, of this date.)

[fol. 21] Mr. Rogers: No further questions.

Mr. Schilback: No questions by the defendant.

(Witness excused.)

Mr. Rogers: That is the People's case.

MOTION TO DISMISS

Mr. Schilback: The defendant, Doubleday & Company, Incorporated, moves to dismiss the information on the ground, first, as a matter of law, People's Exhibit 1 is not obscene, lewd, lascivious, filthy, indecent, or disgusting, as those words are used in Section 1141 of the Penal Law;

On the further ground that, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, the statute is unconstitutional under Section 6 of the New York State Constitution, guaranteeing liberty of press and liberty of speech;

In addition, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, that the statute is unconstitutional as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution; and

On the additional ground that the People have failed to prove the guilt of the defendant beyond a reasonable doubt.

Justice Perlman: Well, this is just on the prima facie case at the moment. You haven't rested, have you, Mr. Schilback?

Mr. Schilback: No, I have not rested.

The Court: The Court will read the book, and the briefs, if any, to be submitted at this time. We will reserve decision on all your motions.

[fol. 22] Mr. Schilback: May I proceed, your Honor?

Justice Perlman: Yes, you may.

THOMAS R. BURNS, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Court Attendant: What is your name?

The Witness: Thomas R. Burns.

Court Attendant: Where do you live?

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The Witness: 139 East 35th Street, Manhattan.

Court Attendant: What is your business of occupation?

The Witness: I am a Sales Manager for Doubleday & Company.

Mr. Schilback: Your Honors, before proceeding with this witness—this is pursuant to an agre-ment with Mr. Rogers—parts of People's Exhibit 1, particularly pages 300, and 307 to 317, are printed in the French language and not in English. For that reason, to make the book in the record complete in English, we have prepared the translation from French into English of those passages. Mr. Rogers has not read the translation, but we have agreed, I believe, that it may be offered into evidence, subject to correction of any errors that Mr. Rogers discovers.

Mr. Rogers: Yes, your Honor. Someone in our office, who reads French much better than I do, has read it and says there is nothing obscene in those portions; and I am per-[fol. 23] fectly willing to agree that what Mr. Schilback has in here is the correct translation.

Justice Perlman: It is going to be very helpful, because, speaking for myself, I don't read French.

Mr. Schilback: That is why it was prepared—not just for you, but also for the record.

The Court: Under the stipulation, it will be received in evidence.

Mr. Schilback: There are three copies, your Honor. May they all be marked as one exhibit?

(The translations referred to were admitted in evidence and marked Defendant's Exhibits A, A-1, and A-2, respectively, of this date.)

Justice Perlman: Now, Mr. Rogers, do I understand that you have agreed that the portions of the book that are in French are not the subject of your charge—they are not lewd, lascivious, or indecent?

Mr. Rogers: That is correct, your Honor.

Justice Perlman: So we can eliminate those portions from our consideration.

Mr. Rogers: I might say, your Honor, at this time, that it is the contention of the prosecution that the only story in this book that is obscene and lewd is the story called, "The Princess with the Golden Hair"; and that book consists of six separate stories. Now, this one called "The Princess

with the Golden Hair" consumes about half of the book.

Justice Perlman: "The Princess——

[fol. 24] Mr. Rogers: —with the Golden Hair."

Justice Perlman: Now, can we agree on this: that you are submitting to our consideration only that particular story in the book, "The Princess with the Golden Hair?"

Mr. Schilback: To that I and the defendant do not agree. This is one book; it is not six stories.

Justice Perlman: Therefore, the defendant wishes that we read the entire book?

Mr. Schilback: The entire book, including, in English, the translation of the parts that appear as French.

Justice Perlman: All right. I thought we might be able to eliminate a part of the book; but we will read the entire book, then.

Mr. Schilback: May I proceed, your Honor?

Justice Oliver: Yes.

Direct examination.

By Mr. Schilback:

Q. Mr. Burns, what is your business or occupation?

A. Sales Manager for Doubleday & Company, Incorporated.

Q. That is Doubleday & Company, Incorporated, the defendant in this case, is that so?

A. Yes, sir, Yes, sir.

Q. And how long have you been employed by that corporation?

A. More than twenty years.

Q. And has that been a consecutive employment?

A. Excepting for three years in the Navy in World War II; United States Navy.

Q. When were you discharged from the Navy?

A. In September, 1945.

[fol. 25] Q. Shortly thereafter did you return to your employment by Doubleday?

A. Immediately thereafter, yes, sir.

Q. How long have you been the Sales Manager of Doubleday & Company, Incorporated?

A. Approximately fourteen months.

Q. The defendant, Doubleday & Company, Incorporated, is a corporation, is it not?

A. Yes, sir, it is.

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Q. When was the corporation organized?

A. In 1897.

Q. And has the corporation, although it has had a continuous history, had various names from time to time?

A. Yes, sir, it has.

Q. What are some of the names that it had?

A. It began as "Doubleday, McClure," and later became——

Q. Was that Mr. McClure the publisher of McClure Magazine and other publications?

A. Yes, sir, it was.

Q. Then after that, what?

A. It became "Doubleday, Page."

Q. And was the Page in that Walter Hines Page, who at one time was the Ambassador to England?

A. Yes, sir, the same Page.

Q. What other names has it had?

A. Then it became "Doubleday, Doran."

Q. And now its name is?

A. "Doubleday & Company, Incorporated."

Q. Now, would you tell us a few of the authors for whom Doubleday & Company, Incorporated, have been the American publishers.

A. Rudyard Kipling, Joseph Conrad, O. Henry, Edna Ferber, Stewart Edward White, Somerset Maugham.

Justice Perlman: What is the purpose of this offer?

[fol. 26] Mr. Schilback: This is merely a description of the corporate defendant. It is a defendant on trial.

Justice Perlman: You want to show the reputation of the corporation?

Mr. Schilback: No, not the reputation. It is just what the corporation is.

Justice Perlman: You are now trying to offer proof of what they have published in the past.

Mr. Schilback: It is merely a description of the corporation, your Honor. I will shorten it if you want me to.

Justice Perlman: I don't know what is the value of it, because we are not trying the reputation of this corporation.

Q. Now, would you tell us approximately how many volumes, separate volumes—not titles, but how many separate volumes are published by Doubleday & Company, Incorporated in the course of a year.

A. Between 24,000,000 and 36,000,000.

Q. That is separate volumes?
A. Yes, sir, units.
Q. Now, approximately how many titles?

Mr. Rogers: Your Honor, I object to any further questioning along this line. I think that Mr. Schilback has established that it is a reputable concern.

Mr. Schilback: I thank you for the concession.

The Court: Well, we will give him some latitude here. Overruled at the moment; but don't let's have too much of that.

Mr. Schilback: I am almost through with it, now.

Justice Perlman: All right.

[fol. 27] (The Court Stenographer repeated the last question as follows: "Q. Now, approximately how many titles?")

The Witness: It is over 300 titles a year.

By Mr. Schilback:

Q. Now, I show you People's Exhibit 1 and ask you if that is a book published by Doubleday & Company, Incorporated?
A. Yes, sir, it is.
Q. When was that book published by Doubleday & Company, Incorporated?
A. March 7, 1946.
Q. Now, what was the original or first printing of that book, how many volumes?
A. Ten thousand copies.
Q. Are ten thousand copies as a first printing a high, low, or ordinary first printing?
A. A low.
Q. Now, will you tell me how People's Exhibit 1 and all the other copies of "Memoirs of Hecate County," by Edmund Wilson, were sold by Doubleday & Company, Incorporated.
A. They were sold in the same manner as the rest of our publications to recognized book shops, department stores, and other recognized dealers in books, sold by our salesmen.
Q. And in your sales to these stores and other customers, was it sold in precisely the same manner as any other book published by Doubleday?
A. Yes, sir.

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Q. I now show you—well, preliminarily, are you familiar with the advertising that Doubleday & Company, Incorporated, used in connection with the sale and distribution of this book?

A. Yes, sir.

Q. I show you four pieces of paper and ask you if you recognize those as advertisements bought and paid for by the defendant?

A. Yes, sir.

[fol. 28] Mr. Schilback: I think I said four. There are five.

Q. Could you tell me the publication and the day of this first advertisement?

Mr. Rogers: Your Honor, at this time I want to interpose an objection just for the record, that this advertising is not material to this issue. The question here is just whether this book is obscene or not, and I don't see how the advertising will assist the Court in any way in determining that question.

Justice Perlman: What is your point, Mr. Schilback, on that?

Mr. Schilback: The point, your Honor, is this: Some of the cases have held that the manner of distribution, and the manner of sale, and the manner of advertising by the defendant is an element to be taken into consideration. For example——

Justice Perlman: Yes. What case do you refer to?

Mr. Schilback: One of the cases, your Honor, is Halsey *v.* The Society for the Suppression of Vice, in 234 New York, at page 1.

Justice Perlman: Are you going to submit a memorandum?

Mr. Schilback: Well, the me-orandum will not take up in detail that specific point.

Justice Perlman: We are perfectly willing to overrule the objection, provided that you will, in your memorandum, brief the question of the admissibility of this testimony.

[fol. 29] Mr. Schilback: We shall submit an additional memorandum, your Honor.

Justice Perlman: All right. Because I myself have some doubt as to whether you have any right to offer advertisements here in connection with a charge that the book is

obscene. But we will overrule the objection at this time; and Mr. Schilback says he will refer us to some decision. I have my doubts whether one——

Mr. Rogers: Your Honor, may I just make one statement? I have read the cases, and the Halsey case that Mr. Schilback refers to, and nowhere have I seen any element of intent. The test is objective—is this book obscene?—and there is no element of intent required in the statute.

Mr. Schilback: There is no element of intent, but, for instance, cases hold that if a book is sold surreptitiously, under the counter and behind closed doors, that that may be taken into consideration. I think, likewise, the fact that a book was sold publicly, openly, by advertisement, in the normal course of business, it is the same element.

Justice Perlman: Now, that, likewise, is that your addition, or is it in the case? I couldn't understand——

Mr. Schilback: No, I know——

Justice Perlman: —the first point that you made.

Justice Oliver: That is Schilback on Evidence.

Justice Perlman: Yes.

[fol. 30] Mr. Schilback: Now, I shall say this: I know of no case that squarely rules on advertisements; but there is language in cases that says the manner of sale, the type of sale, the manner of advertising is an element to be taken into consideration.

Justice Perlman: If it is furtive, if it is a furtive transaction, one might consider that on the question of whether or not the book really is obscene and within the knowledge, within the knowledge of the defendant. But, now you want to offer the reverse of that: If a person, even if the book may be obscene, openly, without any concealment, sells it to the public, that that changes the character of the writing in the book.

Mr. Schilback: No. You see, your Honor, you are dealing with a New York statute, which does not require intent; but even in that situation they permit evidence of furtiveness, which really has nothing to do with the statute.

Justice Perlman: Well, we are going to take it only because you assure us that you are going to offer some memorandum on that question. We will take it and have in mind, if we come to the conclusion that you are wrong on the law, we shall give it no weight.

Mr. Schilback: All right.

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Justice Perlman: All right.

Mr. Schilback: Now, I shall submit at the close of the case today a memorandum which does not cover that point; but within the next day or two I shall have a special memorandum prepared on that point.

[fol. 31] Justice Perlman: Because of other business, we probably will take a whole month before we can read the entire book. There is some other more important reading we have to do.

Mr. Schilback: I offer these five advertisements in evidence.

The Court: Received in evidence.

(The advertisements referred to were admitted in evidence and marked Defendant's Exhibits B, B-1, B-2, B-3, and B-4, respectively, of this date.)

Justice Perlman: I hope that when you do submit your memorandum on this question, you will have copies of these advertisements as well.

Mr. Schilback: All right. I shall, sir.

Justice Perlman: Because we will go to different parts at the end of this week——

Mr. Schilback: Yes.

Justice Perlman: —and it will be difficult to read these advertisements.

Mr. Schilback: All right.

Now, the next subject is along the same line, and for that reason I shall proceed slowly.

Q. Has there been prepared by Doubleday & Company, Incorporated, a list of the various colleges, universities, and public libraries that purchased this book?

A. Yes, sir.

Q. And that list shows purchases made by those universities, colleges, and libraries on direct order from Doubleday & Company, Incorporated?

A. Yes, sir.

[fol. 32] Q. Will you tell me how many of those institutions, colleges, universities, and libraries purchased the book on direct order from Doubleday & Company, Inc., and state what period of time you cover.

Mr. Rogers: Your Honor, I object to that. Certainly this is far afield. There is no evidence that people who purchase this book, ever read it or know anything about

it; and even if they did, the fact that they considered it not obscene can in no way influence this Court. I can submit a list of a lot of institutions that would not purchase the book.

Justice Perlman: Well, Mr. Schilback, what do you say about that? Are we, then, to determine this case on how many libraries will take the book or how many will not take it; or how many universities or colleges will take it, and how many will not? I think the sole test here for the Court is, after reading the book, to decide whether or not it is lewd or in any way condemned by the Penal Law; and it wouldn't matter, so far as I am concerned, whether every library in the country took the book; if I came to the conclusion that the book was lewd and obscene, I would be obliged to say guilty. Now, how does the fact that you have libraries getting these books—I have no doubt that curiosity will lead many people into libraries, and I don't know whether librarians ever read all the books that come in, and I have my doubts whether the deans and the presidents of colleges ever read all the books that are in the hands of their scholars.

[fol. 33] Mr. Schilback: I should be very happy if we could tell your Honor that I think this is determinative. I cannot. But I do think that it is something which may be considered in evidence by this Court as to the type book that "Memoirs of Hecate County" is, the type audience to whom it appealed; and the fact that if purchased by this list of universities and libraries, it is a book which is really a sincere, serious work of literature. Now, the courts have made the distinction that a book which is serious, which is sincere, is different from a book which is just smut for smut's sake, and written for only one purpose—the purpose of being dirty and filthy.

Now——

Justice Perlman: I don't want to test the sincerity——

Mr. Schilback: No, I am not saying it is sincerity, your Honor.

Justice Oliver: I was just going to enlighten my associate with a statement that perhaps the colleges read these very fine advertisements. Here's one: "The first event of the year which can be described as literary."

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Mr. Schilback: That is from Time Magazine, your Honor.

Justice Oliver: Yes. I say, perhaps your advertisements got these people to buy them; then what they thought of them after they bought them, we don't know. But the logic of your position is they bought them on your advertisements and, therefore, the book [fol. 34] is all right. I don't think it is going to weigh very heavily with me whether they did or didn't——

Mr. Schilback: I am not saying it is determinative.

Justice Oliver: —they are such good advertisers. I buy a book because of an advertisement and then I say, "Holy smoke, how did I ever get stuck with that thing!"

Mr. Schilback: Does your Honor sustain the objection?

Justice Perlman: We can't really substitute the judgment of librarians, or even college professors, for the duty which we have, to determine whether this book is condemned by the statute.

Mr. Schilback: I am not offering that as final.

Justice Oliver: You haven't submitted to us what the librarians and the college professors think of the book. You tell us that they bought it, but you don't tell us what they say about it.

Justice Perlman: Well, I take it that you think we can draw an inference from the fact that a large number of outstanding universities and colleges and libraries have accepted this book.

Mr. Schilback: That's right.

Justice Perlman: Then the inference you want us to draw is they would not have accepted it unless they had read it; and the next inference on inference is that, after they read it, they said it was all right. Such evidence, I think, for myself, is highly incompetent.

Mr. Schilback: Do your Honors sustain the objection? [fol. 35] The Court: Objection is sustained; you have an exception.

Mr. Schilback: Exception.

Now, I shall ask—this is not any violation of the Court's order——

Justice Perlman: No, no, Mr. Schilback——

Mr. Schilback: —but there is a possibility, in view of what Judge Oliver said——

Justice Perlman: —make your record as clearly as

possible. For your sake and your client's sake, we hope the record will stay right in the Court of Special Sessions; but no one can tell what may happen after we read this book.

Mr. Schilback: I shall ask one further question, your Honor.

Justice Perlman: Go ahead. You ask questions.

By Mr. Schilback:

Q. From your schedule, did any of these universities and libraries, after purchasing the book, subsequently reorder one or more additional copies?

Mr. Rogers: I object to that, your Honor.

The Court: Same ruling; sustained; you have an exception.

Mr. Schilback: May I state, merely for the record, the purpose of asking that was in answer to Judge Oliver's statement that maybe they bought it on our advertisement. I want to prove that even if they bought the first copy that way, they did not buy subsequent copies of it——

[fol. 36] Justice Oliver: That would have some sense to it, to my way of thinking. That is a matter of evidence, but it is not very essential.

Mr. Schilback: You sustain the objection?

Justice Oliver: We are not going to pass on the impressions of professors or librarians. We are going to pass on the book.

Mr. Schilback: Has the objection been sustained?

The Court: Yes, sustained; you have an exception.

Mr. Schilback: Exception.

That is all with this witness.

Mr. Rogers: No questions.

(Witness excused.)

Mr. Schilback: This, your Honor, is in answer to one of the other things you mentioned—I should call librarians and professors.

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LIONEL TRILLING, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Court Attendant: What is your name?
The Witness: Lionel Trilling.
Court Attendant: Where do you live?
The Witness: 620 West 116th Street.
Court Attendant: What is your business or occupation?
The Witness: I am a teacher at Columbia University, and a writer.

[fol. 37] Direct examination.

By Mr. Schilback:

Q. What position, Professor, do you now have at Columbia University?
A. I am Associate Professor of English.

Justice Perlman: I think you will have to raise your voice.
The Witness: I am sorry. I am Associate Professor of English.

Q. And how long have you been Associate Professor of English at Columbia?
A. Well, as Associate Professor, I have had my associate professorship for about two years. I taught at Columbia University since 1932.
Q. Now, what college degrees do you have, and from what colleges, Professor?
A. I have my Bachelor of Arts degree from Columbia; my Master of Arts degree from Columbia; and my Doctor of Philosophy from Columbia.
Q. Have you taught at any institution other than Columbia University?
A. Yes. I have taught at the University of Wisconsin, and at Hunter College in New York City.
Q. Now, in addition to your teaching duties at Columbia, you stated, I think, that you were a writer?
A. Yes, sir.
Q. Will you tell us what type writing you have done in the past?
A. Well, I have written two books—one on the English Critic, Matthew Arnold, and one on the English Novelist, E. M. Forster. I have written a good many reviews for various critical journals such as The Nation, The New Republic, The Kenyon Review, New York Times, and so on.

[fol. 38] Q. These two books—the one on Matthew Arnold and the one on E. M. Forster—are books on or about literature, are they not?

A. Yes.

Q. Literary criticism and a study of literature, isn't that so?

A. Yes, sir.

Q. And these criticisms and reviews that you have written for The New York Times and other publications are on current literature?

A. Current literature and past literature.

Q. Now, do you have any connection with The Kenyon Review?

A. Yes. I am a supervisory editor of The Kenyon Review.

Q. And will you just tell us very briefly what The Kenyon Review is.

A. The Kenyon Review is a quarterly journal of criticism on literature, published at Kenyon College in Ohio, which deals with matters of general literature and specific problems and criticisms.

Q. And I will ask you—after all, you are connected with it—it is a publication of substantially high standing in the literary world, is it?

A. Yes, I believe it is.

Q. Now, in addition to that, have you been connected with the series called the "American Men of Letters"?

A. Yes, sir. I am one of the four editors of the new series called the "American Men of Letters," published by Henry Holt & Company.

Q. And, just briefly, what is the series, "American Men of Letters?"

A. Well, that is a series of biographies of American writers, based more or less on the analogy of the "English Men of Letters," which was published in the Nineteenth and Twentieth Centuries, which is to give in brief and relatively simple but sound literary form, a knowledge of American Literature to the general reader.

[fol. 39] Q. Now, you stated that you were one editor of several. Would you name the other editors?

A. Well, one is Miss Margaret Marshall, the literary editor of The Nation; one is Professor Joseph Wood Krutch; and one is Professor Mark Van Doren.

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Q. Now, have you read a book, which has been marked in evidence as People's Exhibit 1, a copy of which I show you, which is entitled, "Memoirs of Hecate County," written by Edmund Wilson?

A. Yes, I have.

Q. When did you first read that book?

A. I think I read it shortly after its publication, back in March, possibly in April.

Q. The publication date was March 7. Would you say that you read it within a month or six weeks thereafter, anyhow, at the most?

A. Oh, yes; rather less than that.

Q. And, of course, at the time you read it, this trial had not started or this case had not started. You did not read that book originally in connection with appearing as a witness on any trial?

A. No, sir.

Q. You had never heard of any proceeding against this book?

A. No, sir.

Q. And you didn't anticipate it?

A. No, sir.

Q. So that you read it merely in the course of your general reading, without any specific connection with this trial?

A. Oh, yes.

Q. Now, are you familiar with the literary reputation of the author of that book, Mr. Edmund Wilson?

A. Yes, I am very familiar with it and have been for a good many years.

Q. Will you tell me what the reputation of Mr. Wilson is in the field of literature?

Mr. Rogers: Your Honor, I object to that as not relevant to this issue.

[fol. 40] The Court: Without passing on its materiality—overruled.

(The Court Stenographer repeated the last question as follows: "Q. Will you tell me what the reputation of Mr. Wilson is in the field of literature?")

A. Well, I can begin by saying it is very high. It is difficult to estimate those things, but I would say that he is a literary critic. Mr. Wilson is the best known American literary critic in this country, as well as abroad—in England

and in France; and his reputation in literary circles, general reading public, and academic circles is very high, perhaps higher than any other one critic.

Q. Now, are you familiar with the past works by Mr. Wilson and by "past works" I mean prior to "Memoirs of Hecate County"?

A. Yes, sir. I think I have read them all.

Q. Now, have any of those past works of Mr. Wilson's, to your knowledge, been used as part of any literature courses given in this country?

Mr. Rogers: I object to that as going pretty far afield.

Justice Perlman: Well, if you want to add to the reputation of Mr. Wilson, we have no objection to your doing it.

Mr. Schilback: Thank you.

Justice Perlman: It isn't going to make much difference in the final outcome of this case, because, speaking for myself, the best of authors may write books that are lewd and filthy. They may think they are not. We have to make the decision.

[fol. 41] Mr. Schilback: That is so, your Honor.

The Court: Overruled.

(The Court Stenographer repeated the last question as follows: "Q. Now, have any of those past works of Mr. Wilson's, to your knowledge, been used as part of any literature courses given in this country?")

A. Yes, sir, I know that they have. Most immediately to my knowledge, I have used them myself—two of them.

Q. In connection with the courses in literature that you give?

A. In connection with the courses that I have given.

Justice Perlman: That includes Columbia University?

The Witness: That includes Columbia University.

Justice Perlman: Hunter College?

The Witness: No, sir; only Columbia University. I didn't recommend the books when I was at Wisconsin or at Hunter College.

Justice Perlman: I just wanted to know because what you mean is that these books are used in courses given at the best colleges and universities in the country.

Mr. Schilback: That is right, your Honor.

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Justice Perlman: Because there may be some institutions, that have not the same reputation as Columbia, that might be using some books that Columbia would not use.

Mr. Schilback: But Columbia, among others, does use those books.

Justice Perlman: All right.

[fol. 42] Q. Now, coming to People's Exhibit 1, which is "Memoirs of Hecate County," by Edmund Wilson, will you tell us what, in your opinion, is the meaning of the book, the theme of the book, the literary significance of the book.

Mr. Rogers: Your Honor, I think this is improper, but I have no strong objection to it. I think the Court has to decide those facts.

Mr. Schilback: The only evidence I am submitting is evidence to influence the Court. If I could find one question that determined this case finally, I would ask that question and nothing else. I don't know that question.

Justice Perlman: Apparently there is no objection to it, so that we don't have to rule on it.

(The Court Stenographer repeated the last question as follows: "Q. Now, coming to People's Exhibit 1, which is 'Memoirs of Hecate County,' by Edmund Wilson, will you tell us what, in your opinion, is the meaning of the book, the theme of the book the literary significance of the book.")

Justice Perlman: Shall we divide that into three questions? It might be helpful.

Mr. Schilback: I will let the witness take it any way he wishes.

Justice Perlman: First, what is the meaning of the book?

The Witness: May I answer all three as one?

Justice Perlman: Suit yourself. You think that is going to enlighten us?

[fol. 43] The Witness: I think it will.

Justice Perlman: All right. You may answer.

The Witness: Well, the book can be described in many ways. It seemed to me to be—I think we can begin by saying that it is a largely satirical work, which undertakes to characterize the quality of modern culture and modern civilization in several groups, literary groups—the way people act, feel, think—and it makes a rather stern and severe judgment on what is happening in our modern cul-

ture. The figure of the devil appears frequently in the book—sometimes as a political character, sometimes as a literary character, but always as a functioning character. Sometimes he appears not merely as a character, but in one case (the story called, "The Princess with the Golden Hair") is a neurotic manifestation of one of the characters. This figure of the devil runs, I think, through the whole book; and the devil represents forces of egoism, pride, vulgarity, surrender of moral integrity.

And then, I think, from that point on, I would have to be—rather, I would have to move on to perhaps the literary method of the book, which is a satirical method, a method of rather Swiftian representation of manner, of conversation, of ideals or the lack of them, and all to the intention of inducing in the reader a sense of disgust with all he is likely to find around him in his life.

Shall we go further? I think I have more or less said what I think the intention of the book was.

[fol. 44] Justice Perlman: Will you explain to me, Professor—I heard you say something about the figure of the devil as a character in this book.

The Witness: Yes.

Justice Perlman: I heard you say something about the way of life today, and then you talk about politics, and you talk about culture. Now, will you tell us how the figure of the devil in any way ties up with politics and culture.

The Witness: You mean both?

Justice Perlman: In this book. Either politics or culture.

The Witness: Well——

Justice Perlman: We are near election, and it is a good time to learn how the devil can be tied up with culture.

The Witness: In one of the stories, I think it is called "Mr. and Mrs. Blackburn at Home," the devil appears as a host, a man of considerable wealth, who appears in various guises, and his name appears in different languages, all of them some variation of the work "black." In English he is "Blackburn," I think; in German he is "Schwarzkopf," I think, something like that. He takes many forms, and his wife is a kind of female devil.

Justice Perlman: Do we change the color of the devil from red to black in this book?

The Witness: Yes, he is a black devil, with certain red aspects. He is a—well, he is a seducer of the minds and the integrities of men, as all devils are. He is suggestive.

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[fol. 45] He talks in French in this particular story, which is to perhaps suggest his rationalistic and vaguely immoral background.

In another story, I think it is called "The Milhollands and Their Damned Soul," the devil works a terrible revenge, or the devil buys souls, very much as in the Stephen Vincent Benét story.

Justice Oliver: Are you explaining the book or telling us a story?

The Witness: I am sorry, sir.

Justice Perlman: Well, I mean, that is your interpretation of the devil in the book, and the culture, and all that.

The Witness: Yes. The devil is but one symbol that is used throughout the book.

Justice Perlman: You can see how important it is for us to read this book and to get the whole idea of what the author is telling the public.

The Witness: Yes, indeed; I do.

Justice Perlman: And not everybody is a Professor.

The Witness: Yes.

Justice Perlman: And the average person on the street hasn't the same high motives or high instincts that Professors have. So we have to protect, not just the Professors, who don't need protection, but the average man on the street.

Go ahead, Mr. Schilback.

By Mr. Schilback:

Q. Now, from your reading of the book, and just from the book itself, as you read it, would you say, in your opinion, that this is a serious work of literature?

A. Yes, indeed.

[fol. 46] Q. In your opinion, is it a dirty book, written just to be dirty?

Mr. Rogers: I object to that, your Honor.

The Court: Sustained. That is our province.

Mr. Schilback: I did not hear you, sir.

Justice Perlman: That is our province.

Mr. Schilback: I know it is, but I thought maybe he could testify as an expert without binding the Court.

I take an exception to your Honor's ruling.

Justice Perlman: Any evidence that is received here must influence the Court, otherwise we wouldn't take it.

You have an exception.

Mr. Schilback: (To witness) don't answer this until the Court rules.

Justice Perlman: Go ahead.

Q. From your reading of the book, in your opinion, is this a book which, taken as a whole, from beginning to end, would tend to excite lustful and lecherous desires in the mind of the average, normal, reasonable man?

Mr. Rogers: Same objection, your Honor.

The Court: Sustained.

Mr. Schilback: Exception.

No further questions.

Cross-examination.

By Mr. Rogers:

Q. Professor Trilling—is that the name?

A. Yes.

Q. Did you read this book after you had decided to come here as a witness?

A. Oh, naturally.

[fol. 47] Q. In other words, you read it once and then you read it again for the purposes of this trial?

A. Yes.

Q. Now, I call your attention to the fact that there are six separate stories here, and the book delineates the six separate stories. You notice that part of it?

A. Yes, of course.

Q. And you notice that the first three stories in the book were published, according to the acknowledgement in the book itself, in different magazines—the Atlantic Monthly, the Partisan Review, the Town and Country. Did you, by chance, read those stories in those magazines?

A. I read one, the "Ellen Terhune" story, in the Partisan Review.

Q. Now, there is very little connection, isn't there, between those three stories and the last three stories?

A. The first three are which?

Q. The first three stories and the last three stories.

A. Not one; the first three.

Justice Oliver: Here, Professor——

The Witness: I have the book.

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Justice Oliver: —take a look at it. There is the table of contents there.

The Witness: Well, "very little" is very difficult to judge. I would say that perhaps there was more connection between the last three among themselves than there is among the first three among themselves.

Q. Well, let me put it another way. I am sorry. Go ahead.

A. But I would say there is a connection of theme and character that runs through six of the stories.

Q. You would acknowledge, however, that obviously they are not continued because they appeared in three different [fol. 48] magazines at three different times?

A. No, sir.

Mr. Schilback: That is objected to as argumentative.

Mr. Rogers: Well, I am cross-examining the witness.

Mr. Schilback: It is argumentative.

The Court: Overruled.

Mr. Schilback: Exception.

Q. Isn't that so?

A. No, sir, I would not.

Q. I see.

A. Because it is common literary practice——

Mr. Schilback: May the witness be permitted to continue his answer?

Mr. Rogers: It just called for a yes-or-no answer, your Honor.

Justice Perlman: He has answered.

Mr. Rogers: He said, "No."

Mr. Schilback: Exception.

Q. Now, the first three stories—in fact, all stories are in the first person; that is correct, is it not?

A. Yes, sir.

Q. And in the first three stories there are no characters that run through all of them, are there?

A. Well, there is the "I" who runs through all of them.

Q. The first person, as all of them are; it is in the first person; but other than that there are no characters that appear in one story and then subsequently appear in one of the other first three stories?

A. That I am not sure of. I believe that there is one character named Joe.

[fol. 49] Justice Perlman: The devil, is that a character?

The Witness: Yes, one is called the devil in character.

Justice Perlman: Well, isn't that character in each of these six stories?

The Witness: That would be hard to say, that he appears as a character in each of the six. I would want to refresh my memory on that; but, it seems to me, that as a character he does not appear in all six, though he is referred to in all six.

Q. Now, you notice that "The Princess with the Golden Hair" consumes almost half the book, is that correct? 158 pages, to refresh your recollection; is that about right?

A. Well, that is a mathematical computation.

Q. And the first three stories appeared sometime before "The Princess with the Golden Hair" appeared in print, as far as you know?

A. Yes.

Q. Now, you testified in answer to Mr. Schilback's question that this book had literary significance, is that correct?

A. Yes, sir.

Q. Now, I just want to read a couple of parts here and ask you if you feel that the parts that I read are necessary to assist the book in being of literary value. To read on page 190; you can refer to it, if you like; where the character of the writer, who is speaking in the first person, has Imogen Loomis undressed and he is explaining how she looks: "But what struck and astonished me most was that not only were her thighs perfect columns but that all that lay between them was impressively beautiful, too, with an ideal aesthetic value that I had never found there before. [fol. 50] The mount was of a classical femin-ity: round and smooth and plump; the fleece, if not quite golden, was blond and curly and soft; and the portals were a deep tender rose like the petals of some fleshy flower. And they were doing their feminine work of making things easy for the entrant with a honey-sweet sleek profusion that showed I had quite misjudged her in suspecting as I had sometimes done that she was really unresponsive to caresses. She became, in fact, so smooth and open that after a moment I could hardly feel her. Her little bud was so deeply imbedded that it was hardly involved in the play, and she made me arrest my movement while she did something special and gentle that did not, however, press on this point, rubbing herself some-

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how against me—and then came, with a self-excited tremor that appeared to me curiously mild for a woman of her positive energy. I went on and had a certain disappointment, for, with the brimming of a female fluid, I felt even less sensation; but—gently enough—I came, too."

Now, do you feel that that type of writing adds to the literary merit of a book?

A. That is a difficult question to answer. If I had to answer it yes, or no, I would say yes; not making an abstract principle of "that kind of writing," because I don't quite know how you are characterizing "that kind of writing." If you would characterize it as a rather precise and literal account of a woman's sexual parts in the sexual act, and if you would go on to admit that the story is about sexuality, then I would say yes, it added to the accuracy, precision of the story.

Q. Well, I will read another part, on pages 159 and 160: He has the same woman again, Imogen. Let's see. I will [fol. 51] start here: "I remember one cold winter Sunday when she came in the afternoon—"

A. I am sorry. Where is that?

Q. That is on page 159—

A. At the bottom. I see.

Q. —at the bottom of the page. "—she had come in the afternoon, a day of blank uptown facades and decorous uptown perspectives, when I had gone to the deserted museum to look something up in a book, and, returning, it seemed so incongruous to watch her take off her stiff pink slip and to have her in the prosaic brassiere; the warm and adhesive body and the mossy damp underparts—the mystery, the organic animal, the prime human oven of heat and juice—between the cold afternoon sheets in the gray-lit Sunday room; and one evening when I had come home from a party, at which I had made Imogen smile by my tender and charming gallantries and had kissed her hand at parting, and had made *to* love to Anna for the second time, by a sudden revival of appetite after she had put on her clothes to go, by way of her white thighs and buttocks, laid bare between black dress and gray stockings—she was so slim that it was almost as easy to take her from behind as face to face—while she kicked up one foot in its blunt-toed black shoe as a gesture of playful resistance or simply wanton freedom."

Now, do you think it is necessary to describe people's movements and parts of sex organs to make a book a great book?

A. Literary necessity is very hard to define. In a certain sense, nothing is necessary and everything is necessary. What is necessary is what it is that will give the effect that the writer intends. Here, I take it, he wants to contrast his vulgar—what is outspoken, with what he is calling "tender [fol. 52] and charming gallantry," and his point can't quite be made, perhaps, unless he put one thing against another.

Q. Do you think the great books of literature, the great love stories, say, "Scarlet Letter," have suffered because they haven't had a detailed description of sex acts and sex organs?

A. I don't quite think this is a love story. I think this is a story of sexuality, which is a different thing.

Mr. Rogers: I have no further questions.

Redirect examination.

Mr. Schilback:

Q. These passages that Mr. Rogers read to you and asked you if they were necessary to the book: Let me phrase it a little differently. Do you find a real relationship between those passages and the rest of the book?

A. Oh, yes, indeed.

Q. Now, as to the use of the word "necessary": I should think, going through any book, no word or no sentence is absolutely necessary, is it?

A. No, not necessary to get the general gist of the intention; otherwise, we would not make any sense of what appears, let's say, in a reader's digest boiled down from a large book. We do make sense of it and, I suppose, it could be argued that all the words thrown out are not necessary.

Justice Perlman: Well, the writer determines what is necessary.

The Witness: I beg your pardon?

Justice Perlman: The writer, the author.

The Witness: It seems to me the writer determines it by his intention.

Q. And the test which other persons can make is not "necessity," but whether there is a relationship between

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[fol. 53] the individual passages and what the book as a whole is tending to establish, is that so?

A. Yes, and on that——

Q. You do find such a relationship?

A. Oh, yes.

Q. Now, would you say that, not passage by passage, but, taking the book as a whole, the effect of almost everything is necessary to that book?

A. Yes.

Q. Now, you were asked whether you re-read this book prior to coming to Court, and you said you did. When I first saw you, you had already read the book, without any connection with this trial?

A. Yes.

Q. And at that time were your opinions the same as they are now, after a second reading of the book?

A. Oh, yes.

Q. Now, you stated that the devil appears in this book from time to time, and I think there may be some confusion. I think in only one part does the devil appear identified as the devil, isn't that so, when he makes a speech?

A. As a physical character, that's right.

Q. That is right, as a physical character. The other appearances of the devil—maybe we can use the word "symbolism"; some other character or person is used——

A. By his effects; by his effects.

Q. By his effects. In other words, characters who were given names other than "Mr. Devil," are, in effect, conducting the work of the devil and representing the devil, is that so?

A. Yes.

Q. So that your testimony is not that the devil appears repeatedly identified as "Mr. Devil," except——

A. No.

Q. Except by symbolism, is that so?

A. Yes.

Q. Now, Mr. Rogers asked you if these were six separate stories. Will you tell me, in connection with all six, whether [fol. 54] there is a common theme running throughout the entire book, from the beginning to the end?

A. Yes, there is a common theme.

Q. And will you tell me what the theme is?

A. The theme that runs through all the stories is the theme of the corruption, of the defeat of what is good and the corruption of what is pure; and with integrity, and the increasing ease with which vulgarity and mendacity have become available to people in our culture.

Q. Now, in your opinion, is the theme of this book a moral theme or an immoral theme.

Mr. Rogers: I object to that, your Honor.

The Court: Overruled. We will take it.

Justice Perlman: Is the theme moral or immoral?

The Witness: The theme is very moral.

Q. Very moral?

A. Very moral.

Q. Mr. Rogers read to you some isolated passages from the book. In many of the great books of this world, including classics, could you go to many of them and take from those books a passage here and a passage there, which, standing all alone, might seem to tend to create lecherous desires, or be obscene, or be indecent?

Justice Perlman: Mr. Schilback, I have held we must not take any one isolated sentence or paragraph.

Mr. Schilback: All I am asking——

Justice Perlman: So we need not have the opinion of the Professor on that. We are obliged to follow that as the law, as I see it.

[fol. 55] Mr. Schilback: I think that is the law; and if the Court is so ruling, then I do not have to ask the question.

Justice Perlman: That is the law. We can't take one passage alone.

Mr. Schilback: No further questions.

Mr. Rogers: No further questions.

(Witness excused.)

Mr. Schilback: The defendant rests.

Mr. Rogers: The People rest, your Honor.

Mr. Schilback: Shall I make my motions now, your Honor?

Justice Perlman: Yes.

Motion to Dismiss

Mr. Schilback: The defendant at this time moves to dismiss on the ground, first, that People's Exhibit 1 is not

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obscene, lewd, lascivious, filthy, indecent, or disgusting as those words are used in Section 1141 of the Penal Law;

On the further ground that, if Section 1141 of the Penal Law is interpreted so as to include People's Exhibit 1, "Memoirs of Hecate County," it is unconstitutional under both the New York State and the Federal Constitutions; that in those Constitutions, without limiting the motion to particular sections, it is unconstitutional under Section 8 of the New York State Constitution and in violation of the due-process clause of the Fourteenth Amendment to the Federal Constitution; by mentioning those sections, I do not limit it merely to those, but I specify those.

In addition, the defendant moves to dismiss on the ground that the People have failed to prove the guilt of the defendant beyond a reasonable doubt;

[fol. 56] In addition, the People have failed to prove the allegations of the two informations which have been consolidated, beyond a reasonable doubt.

The Court: We will reserve decision on all your motions.

COLLOQUY

Justice Perlman: Now, Mr. Schilback, I think that we would like at least a month to finally make a decision in this case; not that we will need that long, but we won't reach it much before two weeks from now. By that time, some of the testimony that we have had here today may be forgotten by us; and it would be very helpful if you would let us have a copy of the stenographer's minutes of today.

Mr. Schilback: Would your Honors be satisfied with one copy or do you want three?

Justice Perlman: One copy.

Mr. Schilback: All right. We shall certainly provide a copy.

Justice Perlman: And the amendment. We have the briefs. Those we would like to have——

Mr. Schilback: I have briefs which I can submit now, which include almost everything except the one point that was raised today; and if I may have a little time, I will submit on that.

Justice Perlman: Well, would you like to have one brief to cover all these points, or would you like to submit a supplemental brief?

Mr. Schilback: The brief that I now have is printed. So I think the supplemental one will not be—— May I approach the bench?

Justice Perlman: Yes.

(Discussion off the Record.)

Justice Perlman: Let's do this: All briefs to be in by the 12th of November, the day after Armistice Day. Is that enough time?

[fol. 57] Mr. Schilback: Complete.

Mr. Rogers: Yes.

Justice Perlman: And then we will render our decision on November 27, the day before Thanksgiving. That will be just about the right time to pass on this.

Mr. Schilback: Judge, do you desire any argument now, or at that time? I don't care——

Justice Perlman: Whenever you want your argument—you can argue it now or in your brief.

Mr. Schilback: I mean oral argument.

Mr. Rogers: I don't care.

Justice Perlman: I don't think we need any oral argument. November 12. We have some briefs now from the defendant, and we will take all other briefs on the 12th, and we will read the book. We won't need copies of the advertisements.

Mr. Schilback: You will not?

Justice Perlman: No.

Mr. Schilback: If you do, I can get them.

Justice Perlman: We will get together. That won't be necessary.

Reporter's Certificate to foregoing transcript omitted in printing.

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[fol. 58] In Court of Special Sessions of the City of New York, Part VI—New York County

The People of the State of New York

against

Doubleday & Co., Inc., Defendant

Calendar Nos. 1, 2; Info. Nos. 2721, 2722
Giving Information as to How to Obtain Obscene Book, and Publishing Obscene Book

Selling Obscene Book

Decision

New York, N. Y., November 27, 1946.

Before Hon. Nathan D. Perlman, Justice Presiding; Hon. Frank Oliver, Hon. William A. Farrell, Associate Justices

Appearances:

For the People: William P. Rogers, Esq., Assistant District Attorney, New York County.

For the Defendant: Messrs. Satterlee, Warfield & Stephens, 49 Wall Street, New York, N. Y., by James F. Dwyer and Milton Schilback, of Counsel.

[fol. 59] Mr. Rogers: Numbers 1 and 2.

Court Attendant: For Decision, Number- 1 and 2, Doubleday & Company, Incorporated.

Justice Perlman: Are we all ready?

Mr. Rogers: Yes.

Mr. Schilback: Ready.

Justice Perlman: The motions have been made, I gather. There are two motions before the Court—no, I don't think we passed upon the motion made at the end of the People's case; you reserved decision on that.

Mr. Schilback: That is so, your Honor.

Justice Perlman: And now you have a motion made at the end of the entire case not only that the People have failed to establish a case, a *prima facie* case, but also the guilt of the defendant has not been established beyond a reasonable doubt.

Mr. Schilback: That is so, your Honor.

Justice Perlman: Those are the motions that have been made. By a majority of the Court all motions to dismiss and to acquit are denied;——

Mr. Schilback: Exception.

Justice Perlman: —Justice Perlman dissents. The defendant is found guilty; Justice Perlman dissents and votes to acquit. I should like to state the reason for my dissent at this time.

(Justice Perlman's dissenting opinion which was delivered at this point in the proceedings is printed herein at page 76.)

Now, Mr. Schilback, we could adjourn this for Sentence, or if you wish we can proceed to Sentence this morning. This is a corporation. We have all the facts. You, during the course of the trial, offered for proof of the character of [fol. 60] this defendant corporation the type of services rendered, the work done.

Mr. Schilback: Yes, your Honor.

Justice Perlman: If you wish it we will proceed to Sentence this morning.

Mr. Schilback: The defendant is prepared to proceed to Sentence. May I first, your Honor, move to set aside the verdict as contrary to the law, contrary to the evidence, contrary to the weight of the evidence, and on all the other grounds set forth in the Code of Criminal Procedure, and, in addition, on the grounds set forth in my motions to dismiss at the end of the People's case and again at the end of the entire case.

Justice Perlman: By a majority of the Court your motion is denied; I dissent and vote to grant the motion—all motions.

Mr. Schilback: Exception.

Justice Perlman: Now, Mr. Rogers, would you like to be heard first, or, Mr. Schilback, would you like to be heard first on Sentence.

Mr. Rogers: I just have one word to say, your Honor, and that is in view of the Court's decision that this book is obscene, I want to quote just some parts of a letter from Mr. Schilback to the Court, and I don't do it to embarrass Mr. Schilback, I am sure he will understand, but during the time that this decision was pending, before your Honors

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decided, Mr. Schilback wrote a letter in behalf of the defendant in which he said: "It has probably come to your attention"—meaning the Court—"of a columnist's report that my client, Doubleday and Company, has melted down the plates of 'Memoirs of Hecate County.' The plates of 'Hecate County' have not been melted down, they are still intact in the printing plant of Doubleday & Company, In- [fol. 61] corporated, at Garden City, New York. Unless your Honors decree otherwise, these same plates will be used for future printings of the book." I don't want to read the rest of the letter because I don't think it is important.

I wanted to say in view of the fact that this Court has said that this book was obscene, I assume that the defendant understands that any future publication or printing or selling of this book is a violation of law, established law now of New York City, and will not be tolerated. In that connection I would just like to mention that under the law now anyone who sells it or distributes the book, even by way of a lending library, under the law is guilty of a crime and can be sentenced to one year in jail. And now that the case has been decided and your Honors have found that this book is obscene, the District Attorney's Office will proceed against any individuals who violate the law.

Justice Perlman: Mr. Schilback, I gather you understand that to be the law.

Mr. Schilback: Well, may I first say that the letter from which Mr. Rogers quoted has in it that the plates are intact, and then a sentence which is, "Unless your Honors decree otherwise the same plates will be used for future printings for the book." I can assure the Court that my client and I now fully realize that your Honors have decreed otherwise, and are completely consonant with what that letter says, and as we understand the law to be there will be no printing of this book, no sale of this book, until a determination of an appeal in this case, and if the majority of this Court is reversed, as I am confident will be done, we then feel that there may be future printings and sales of the book. [fol. 62] For the purpose of Sentence I will not repeat what appeared in the course of the trial and came to your Honor's attention. I will say that even with the opinion of the majority in this case, this book was published sincerely by Doubleday & Company, Incorporated, in the real

belief that it was a sincere, definite contribution to American literature. In view of your Honor's decision we are now in a position where we did make a mistake of judgment. However, it was not malicious, but it was a sincere, honest attempt to contribute to current American literature, and I submit that to the Court prior to the imposition of sentence.

Justice Perlman: Mr. Rogers, there are two cases here, you tried them together.

Mr. Rogers: Yes, your Honor, we tried them——

Justice Perlman: There was a stipulation.

Mr. Schilback: That's right, your Honor, except one count of the first indictment was withdrawn. In other words, we tried two counts.

Mr. Rogers: That's right, and at this time I will move to dismiss the count we did not try, because I thought it was superfluous for the purposes of the trial, that is the count giving information where the book may be purchased.

Justice Perlman: As I gather here, then, Information No. 2 on our Calendar today was not tried——

Mr. Schilback: That was tried, your Honor.

Justice Perlman: —Just a minute . . .

Mr. Rogers: In other words, there were two charges, one for selling the book, and one for publishing the book, and those were joined and tried together.

[fol. 63] Justice Perlman: I am just trying to get this clear. There are two counts in one Information——

Mr. Rogers: That is correct, your Honor.

Justice Perlman: And I think those two counts include the count in the Second Information, or did you not try one of the counts in one of the Informations?

Mr. Schilback: One of the counts in that Information was not tried, your Honor.

Mr. Rogers: That's right, we tried the Second Count; we tried the Second Count in Case No. 1 on the Calendar today, which charges the defendant with publishing the book, and we tried the count in Case No. 2 on today's Calendar which charges the defendant with selling the book.

Justice Perlman: Therefore, our verdict——

Mr. Rogers: There were two separate Informations on one trial.

Justice Perlman: Now to be certain that we understand the verdict of the Court, by a majority of the Court all

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motions are denied, and I dissent in each of these two cases on the Calendar, 1 and 2. By a majority of the Court the defendant is convicted in each of the two cases; I dissent and vote not guilty in each case. By a majority of the Court with my dissent your motions in each of these cases to set aside the verdict is denied.

Mr. Schilback: And I have an exception to each and every one of those rulings.

Justice Perlman: That's right.

Justice Oliver: In view of the fact that this misunderstanding has occurred you must again make your motions for arrest of judgment to dismiss upon each.

[fol. 64] Mr. Schilback: All right. On each count I move to set aside the verdict——

Justice Oliver: Not on each count, on each Information.

Mr. Schilback: On each Information I move to set aside the verdict of this Court as contrary to law, contrary to the evidence, contrary to the weight of the evidence, on all the other grounds set forth in the Code of Criminal Procedure, and on the grounds set forth on my motions to dimiss at the end of the People's case and at the end of the entire case.

Justice Perlman: All right. All those motions are denied; I dissent.

Mr. Schilback: Exception in each case.

Justice Perlman: The sentence of the Court in Case Number 1 on the Calendar, Giving Information—the first case on our Calendar is the Publishing—five hundred dollars; and Case No. 2, Giving Information, five hundred dollars——

Mr. Rogers: No, Selling, your Honor——

Justice Perlman: Selling an Obscene Book, five hundred dollars. That is the sentence of the Court, a total of one thousand dollars.

Mr. Rogers: Just to clear the record as to the other count —has the Court finished the sentence?

Justice Perlman: Yes.

Mr. Rogers: As to the other count, Giving Information, I move to dismiss that count in view of the decision of the Court in the other two cases.

Justice Perlman: That is, Count Number One in Case Number One.

Mr. Rogers: Correct.

Justice Perlman: The conviction is Count Two of the Information.

Mr. Rogers: Yes, your Honor.

[fol. 65] Justice Perlman: Count One is dismissed. Fine is one thousand dollars. Court will recess.

(This is to certify that the foregoing is a true and correct transcript of the within proceedings as reported by me.)

David D. Geddes, C. S. R., Official Stenographer.

In Supreme Court of New York, Appellate Division, First Department

People of the State of New York, Respondent,

against

Doubleday & Company, Inc., Defendant-Appellant

Stipulation as to Exhibits Not Printed

Subject to the approval of the Court it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following numbered and described exhibits need not be printed, photographed or photostated in the printed record on appeal, but five copies of each exhibit shall be handed up by the defendant-appellant upon the argument or submission of any appeal herein [fol. 66] with the same force and effect as if incorporated on the printed record on appeal.

People's Exhibit

1. Unmarked copy of "Memoirs of Hecate County."

Defendant's Exhibits

A. Translation of page 300 of People's Exhibit 1.

A-1. Translation of page 307 of People's Exhibit 1.

A-2. Translation of page 317 of People's Exhibit 1.

Dated: New York, December 11, 1946.

Frank S. Hogan, District Attorney of the County of New York. Satterlee, Warfield & Stephens, Attorneys for Defendant-Appellant.

So Ordered. F. M.

(Here follows 5 photos, side folios, 67-68, 69-70, 71-72, 73-74, 75)

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is good in the way the Goncourts or Maupassant are good, and, having recently re-read 'Renée Mauperin', I should say the longest of the six stories, *The Princess with the Golden Hair*, is not only more enjoyable than the French novel but is much more true in its psychological observation and it contains a riper and more human wisdom . . . It is a love story, sophisticated, even cruel, unafraid, yet moving and illuminated with a rare beauty . . . I am convinced every word of it is true.

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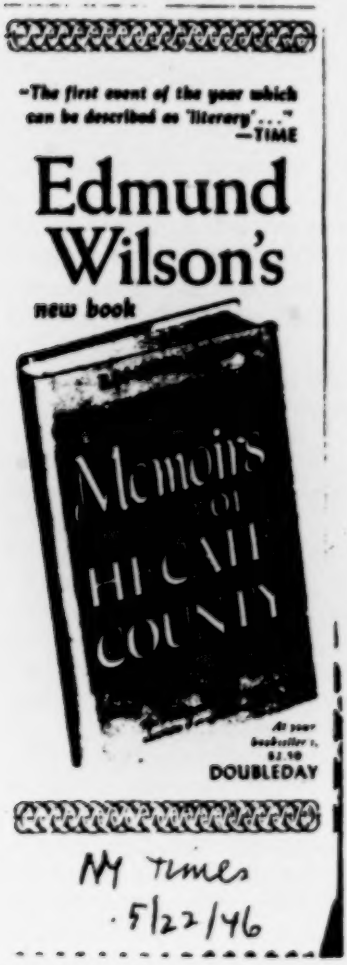

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[fol. 76] In Court of Special Sessions of the City of New York, New York County

People of the State of New York

against

Doubleday & Company, Inc.

Dissenting Opinion

Opinion of Justice Nathan D. Perlman:

I am inclined to accept the position taken by the prosecution that the story "The Princess with The Golden Hair" may be considered separately and apart from the rest of the book "Memoirs of Hecate County".

The crucial consideration is the standard to be applied by the court, the concept of obscenity against which the story in question must be tested.

The prosecution would have obscenity defined as that which tends to deprave and corrupt the young and immature, those whose minds are open to such immoral influences and into whose hands the book may fall. I find that concept grossly inadequate and, in fact, detrimental to the best interests of the general public.

Such a standard would exclude from consideration the effect of a story or book on the minds of the mature, those who are not open to such immoral influences. These latter, [fol. 77] the bulk of the reading public, must in their daily lives, face, understand and resolve the complex problems of modern life and society. In this connection they have traditionally relied on those artists and writers who possess an acute and sensitive insight into those problems and an ability to convey that insight through the written word.

To adopt a standard of obscenity which would disregard the interests of the mature and ignore the positive and vital contribution which books can make in their lives, is to needlessly sacrifice the welfare of a vast portion of our community. I am confident that such was not the intention of the legislature. Section 1141 of the Penal Law, as every other statute, is fundamentally intended to benefit and protect society as a whole. Consequently it is reasonable to take into account in each case the varied effects of the book or story in question. Any rational evaluation of a book

from the point of view of obscenity must give consideration not only to its detrimental tendency to deprave the minds of the young and immature but also to its beneficial tendency to enlighten the mature.

It was this latter aspect which led United States Circuit Judges Augustus N. Hand and Learned Hand and United States District Judge John M. Woolsey in the Ulysses case to place so much stress on the truth, sincerity and art qualities of the book there under consideration. These Judges weighed carefully the standard now urged by the prosecution in the instant case and rejected it (United States *v.* One Book Called "Ulysses" 72 Fed. 2nd 705; 5 Fed. Supp. 182.)

Giving due weight and consideration to the artistic impact of "The Princess with The Golden Hair" and judg-
[fol. 78] ing that story as a whole, irrespective of certain passages which by themselves might have a tendency to deprave the young and immature, I find that the story is not obscene within the meaning of Section 1141 of the Penal Law.

The writer of the story is evidently and honestly concerned with the complex influences of sex and of class consciousness on man's relentless search for happiness. That is a problem which is also of deep concern to the matured reading public. That public is entitled to the benefit of the writer's insight and that right may not be lightly disregarded by excluding from consideration all interests but those of the young and immature.

To suppress what may appear bad in a book is also to suppress what is good therein. The Court's primary duty is to interpret all laws in the terms of the general welfare.

I vote to acquit the defendant.

(Sgd.) Nathan D. Perlman, Justice of the Court of Special Sessions of the City of New York.

[fol. 79] AFFIDAVIT OF NO OPINION

CITY, COUNTY AND STATE OF NEW YORK, ss:

James F. Dwyer, Esq., being duly sworn, deposes and says, that he is one of the attorneys for the Defendant-Appellant herein, and is familiar with the facts and proceedings herein; that no opinion was delivered or written

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by the Trial Court in the rendering of the judgments of conviction, but the minority (Perlman, J.), filed a dissenting opinion which is printed herein at page 76.

James F. Dwyer.

Sworn to before me this 3rd day of January, 1947. Robert V. Damiano, Notary Public in the State of New York, Residing in New York County. N. Y. Co. Clk's No. 31, Reg. No. 255D7. Commission Expires March 30, 1947. (Seal.)

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] In Court of Appeals of New York

People of the State of New York, Respondent,

against

Doubleday & Company, Inc., Defendant-Appellant

Notice of Appeal to Court of Appeals

Sirs:

Please Take Notice that the defendant hereby appeals to the Court of Appeals from the judgments of the Appellate Division of the Supreme Court for the First Judicial Department dated May 16, 1947 affirming the judgments of conviction rendered against said defendant in the Court of Special Sessions of the City of New York, County of New York, on the 27th day of November, 1946, and from each and every part of said judgments and all other and intermediate orders herein made.

Please take further notice that this appeal is taken pursuant to leave granted on June 13, 1947 by Hon. Stanley H. Fuld, a Judge of the Court of Appeals, who certified that [fol. 82] there are questions of law involved which ought to be reviewed by the Court of Appeals.

Dated, New York, N. Y., June 16, 1947.

Yours, etc., Satterlee, Warfield & Stephens, Attorneys for Defendant-Appellant, Office and Post Office Address, 49 Wall Street, Borough of Manhattan, New York 5, New York.

To: Hon. Frank S. Hogan, District Attorney of New York County. Hon. Antonio Calitri, Clerk, Court of Special Sessions of the County of New York.

[fol. 83] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 16th day of May, 1947.

Present: Hon. Francis Martin, Presiding Justice; Hon. Albert Cohn, Hon. Joseph M. Callahan, Hon. David W. Peck, Hon. John Van Voorhis, Justices.

17625-17626

Order of Affirmance on Appeal from Judgment

People of the State of New York, Respondent,

vs.

Doubleday & Company, Inc., Appellant

Order of Affirmance

Appeals having been taken to this Court by the defendant from judgments of the Court of Special Sessions of the City of New York, New York County, rendered on the 27th day of November, 1946, convicting defendant, upon two informations consolidated for trial, of selling and publishing an obscene book and said appeal having been argued by Mr. Whitney North Seymour of counsel for the appellant, and [fol. 84] by Mr. Whitman Knapp of counsel for the respondent, and a brief having been filed by Womrath Bookshops & Libraries, Inc., as *amicus curiae*; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgments so appealed from be and the same are hereby, in all things, affirmed.

Enter

F. M.

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[fol. 85] IN COURT OF APPEALS OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, Respondents,

against

DOUBLEDAY & COMPANY, INC., Defendant-Appellant

CERTIFICATE OF LEAVE TO APPEAL TO COURT OF APPEALS

I, Stanley H. Fuld, a Judge of the Court of Appeals, do hereby certify that in the record and proceedings in the Appellate Division of the Supreme Court, First Judicial Department, in the cause of People of the State of New York *v.* Doubleday & Company, Inc., questions of law are involved which ought to be reviewed by the Court of Appeals.

Dated, New York, N. Y. June 13, 1947.

(Signed) Stanley H. Fuld, Associate Judge of the Court of Appeals.

[fol. 86] DEFENDANT'S EXHIBIT "A"

Translation of pages 300, 307-317 in "Memoirs of Hecate County," by Edmund Wilson.

(Introduced in evidence as Exhibit A, see fol. 197.)

Mr. and Mrs. Blackburn at home.

(page 300) "Ah, you know, it's tremendous. It's the real American art which the Americans don't know."

(page 307) It's not the Parthenon, but it belongs to the beautiful.

(page 308) (If we're in for some catastrophic happenings, it will hardly turn out to the advantage of Hell). The Devil will not find what he expected there. The European world, allow me to express myself in French, is starting to inure itself to all moral considerations to a point where one is as satisfied with him as with him who is supposed to be against one. It doesn't make any difference to you that we speak French. I know that you know it well. You were raised in France, right? So you have a very good ear. It's happened in the last years that I resort more and more to this language so finished and so clear. It's the only way, I find, to give a semblance of logic to the happenings which

are becoming every moment more and more insane. (What he said about my French was not true, but it pleased me to hear him say it. His own French I had always thought that of a Belgian businessman or of an American lawyer who has practiced in Paris; but, as I listened to him talking tonight, I seemed to note in it a certain flavor, a turn of phrase, of the eighteenth century. Returning to the earlier topic, I asked him whether the Nazis in Germany were doing nothing to gratify the Devil).

[fol. 87] (page 309) "As for Hitler himself," (he replied), he's hardly interesting for the Devil. Why, he's a saint, a patriot, a type along the line of Joan of Arc. That idiot doesn't even want to do harm. He goes to no end of trouble, in the light of moral principle, to have massacred a Jew or a Pole, because he doesn't know it's only a man—being himself hardly a man. He's a madman, a paranoiac, like most of the saints, after all. He thinks quite simply that he's persecuted, that in him his country is persecuted and that it's very necessary to defend himself. As for the other Nazis, except Goebbels, who is a rather fine example of the abortive and embittered man of letters, they are only third or fourth rate scoundrels or simply Schaffkopfe Germans, who from the moment they could no longer take seriously the Sovereign Judge nor his Adversary, made their stronghold a beautiful discovery: the knowledge that they had found perfectly a state where they could do everything they wanted on the land without running the risk either of being overwhelmed on the spot by one or of being abused by the agents of the other. I don't want, however, to give the impression of not attaching importance to this certainty of contemporary man that he is free to destroy or construct, to do what seems to him good for himself and for those who submit to him, without regard for the good and bad institutions within superhuman powers. It's even, this revolution on a moral plan, the main issue of our time —an event alongside which the regroupings about which one hears so much are either presented only as very superficial charges, the replacement of one band of insects by another, a political hocus-pocus which remains without any significance because the social classes which substitute one for the other feel, both of them, exactly the same desires [fol. 88] and propose identical ends—or else they owe their sole interest, these regroupings, to which they've set to brawling by the impulse of this central motor.

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One sees clearly that it's almost the same thing in Russia. Stalin does what he wants with the Russians because, as a Marxist, he didn't shrink from the liquidation of religion and found himself immediately, with primitive joy—and a little

(page 310) astonishment, I think—supreme and unchangeable master of 170 million human beings whom he knows how to guide exactly like a great agricultural tractor on one of his collective farms. One can organize them, you know on any sort of scale to accomplish any sort of work. One can even make them swallow the idiotic likes of the Pravda—and one can make them ascribe to any sort of idea. First, you talk to them about the Five Year Plan and you impress them into factory service and public works—a kind of business the Russians hardly like, afterwards you'll make them fight the Germans at a price of 25 million men, after which Comrade Stalin himself will have opened the door to the Nazis and, so to speak, will have invited them expressly to overrun homeland Russia—because this very shallow man admires Hitler and is even awestricken before him. He will want to be a good ally even on the eve of the day when this madman will show him with a stroke of bombs and machine guns that, to admire a great moral power, it isn't necessary to give it your confidence, especially when you yourself make the pretense of playing an amoral role. I'm speaking of things which haven't happened yet but will surely occur."

. (Little enthusiasm though I felt for Stalin, I could not believe in these fantastic prophesies, which seemed to me [fol. 89] prompted by some spirit of perversity at the same time philistine and cynical; and I reminded him that it had been, after all, the idealists Lenin and Trotsky who had first mobilized and unified the Russians, and that the Soviet Union had been dedicated to the establishment of a socialist society. I spoke of the morality of Marxism and of the creative aims of the Marxists.) I don't have a doubt, he replied, that Lenin and Trotsky, like Marx—had indeed their own morality, but this rather exalted morality interests only moderately him whom you know as the devil. Without doubt there are striking scraps of old Protestant theology in this system which is so vaunted as being free from all religiousness, but it is undoubtedly the last ray of a light which is going out; and it appears to me only too evident that this Marxist system itself is always deteriorating

and that the time is not very far off when Stalin will smite it with a taboo and will not scruple to exterminate those who profess it. Meanwhile, I concede you that the

(page 311) grandiose projects which they strive to realize in the Soviet Union could very well be directed towards an end which you characterize as the good, that they could even merge them, even though it appears to me that the chances are at least equal that they will merge in what you call the bad. In one case or the other, the important thing for the person of whom we speak is that the Russians as well as the Germans operate only for uniquely practical motives and that they do not hamper the ancient prestige of these powers of heaven and hell to which their forefathers have paid so much homage. You think strongly that the Fiend is far from staying much longer in this atheist country where they no longer value his work and where he no longer feels at home. He's a character, a kind of character, as Saint-[fol. 90] Simon said of Voltaire—with the important difference that the future was with Voltaire—(he gave a rueful and ironic smile) he's a character of the old European world who has adapted himself as best he can to capitalistic society but who no longer speaks the same language as these scoundrels from the Kremlin and the Wilhelmstrasse —these *khamy* as they were formerly called in Russia.

You undoubtedly remember the soviet agent, the professional informer, whom you met here. He's a very clever man, very crafty—a native of Bessarabia and marvelous at all languages. He had even—a thing which one sees rather seldom among Soviet diplomats—learned to acquire in the course of his travels a certain knowledge of the world. Formerly I would very willingly have recruited him, but today I don't want any part of him, I no longer have anything to offer him. I assure you this man makes me afraid. It's he who tried to tempt me. When he wrote me begging me to receive him, I would like to have been able to delude myself with the hope that he had some need of me, although the rather peremptory tone with which he sent word didn't leave me without anxiety. I knew well that they placed him at the embassy to spy on the unhappy ambassador, and to make sure he didn't interest himself too much in the countries near the one from which he was accredited—and I couldn't stop myself from asking whether he was instructed to come and rummage through my affairs. Well, he had the cheek to propose that I devote part of my time—(a part

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time job, as we say)—to his beautiful organization. He expounded to me with a frankness which sought by no means to spare my sensitiveness

(page 312) as dean of Evil—since I know well there is neither the means nor necessity to hide from you my identity—you're very intelligent and I dare to hope that [fol. 91] it doesn't embarrass you if I speak with entire frankness—this dope then pointed out with steely logic that the Good D—(that my Opposite Number)—It's I this time who almost fails to show respect—there's the vice of the century, as I was saying just now: the contempt for sacred things!—(that my Opposite Number had been liquidated and that my own occupation was gone.) Well, I couldn't do better than to engage myself to the service of the U.S.S.R. I struggled to make him admit that there still remained in Russia real and living traces of conscious human maliciousness. I raised several public lies on the part of the government which seemed to me as gratuitous as the very passionate inventions of the incomparable Russian novel, and I recalled to him the traits of cruelty which seemed to me absolutely worthy of the beautiful days of Ivan the Terrible. I cited for him the Russian word *chistka*—a delicious euphemism which means, in a literal sense, quite simply a light purge but which is used also to denote the condemnation to death or to forced labor of a million men and women who have done nothing more guilty than to consecrate their entire lives to applying the principles of Lenin and to striving to consummate his work. 'Always these diminutives, I said to him, it's this childlike way of speaking that gives so much charm to the adorable Russian language, don't you think?' 'Without speaking of Ivan IV,' he replied, talking like a lawyer, haughty and harsh like a judge, 'whom we have come to recognize as the great stabilizer of primitive and divided Russia as well as the founder of strong and manageable Russia—I can tell you that under the Soviet Regime all these diminutives of the old Russian [fol. 92] language—which are only humiliating remembrances of the fawning and servile manners of feudal slavery—I can tell you that these cute childishnesses are in the process of disappearing. We tolerate them, we men of culture, in pursuance of a necessity which makes us sometimes tolerate the ridiculous inclinations of a rather backward people, until they have been taught a more modern language, entirely technical and clear-cut which will not

leave any place for all these insipid gentilities which are debasing.

(page 313) He assured me, for the remainder, with much insistence, that there was no conscious cruelty in the purges which were administered in Russia, and I was obliged, my faith, to believe him. Stalin, himself naturally—as well as some others of his officials—are not the same brand as Hitler and the vulgar German tyrants: they are either primitive men to whom vengeance brings a keen satisfaction or timid and ambitious beings who like to crush—while relishing a bitter pleasure—the more courageous and unselfish souls. But, in general, it is only too true that in Stalinist Russia they are succeeding in conditioning the young people to apply these murderous methods with an almost automatic cold bloodedness. They shoot the condemned men in the back, as you know, while bringing him before the tribunal; blood flows in two little canals built into the side of the road, and they wash it away with great jets of water that leave hardly a trace. The bodies don't stay there very long—they remove them, bury them, and think no more about it. In the case where the wife must also disappear, they aren't bothered about the children, who, without understanding anything about it, find themselves orphans all of a sudden, [fol. 93] and become objects of scorn for their school companions and even for their teachers—nobody dares to come to their aid. But, what's stupefying to me, they won't even experience any pleasure in thinking about their misfortunes. They simply let them fall like scraps which aren't the right size on the convoys of the Taylorized factories, where as every other people except the Soviet Russians take care to gather them up and to find some use for them, although one is far from forgetting of course, that the human resources of Russia are as unlimited as her grains and minerals. As for Hitler Germany—you can believe me on my word, though I doubt that you will stop there—this will be enlarged on again. They will apply themselves very systematically to asphyxiating and burning people wholesale in a type of homicidal factory built especially for that—they will reduce them to ashes with astonishing speed and they will distribute them in large sacks in the agricultural districts to be used as fertilizer for the fields. They will mobilize for this, first, the pathological criminals who will be freed from the chain-gangs on the conditions that they lend themselves to crimes even more than the ones for which

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they were imprisoned. But they are there only as a (page 314) temporary expedient, employed only until the day when they will have taught the young people that everything that isn't German isn't human, so well that they will find themselves in the position of performing similar duties without flinching but without enjoying the least pleasure. All of which, naturally, hardly makes me rejoice.

Ah, how I will regret the good taste of the French on the day when France will find herself, as she is going to be, torn up by the brutes of Boche. French cruelty, you [fol. 94] know, is a little a national specialty like cooking and the criticism of literature. What a marvel, The Garden of Torments, it's the beautiful title of a book by Mirabeau—from the French novel of Laclos up to Proust. Louis de Sade, what a tremendous genius. I was musing about it just now when I thought about the unspeakable vileness of these types of Soviet Russia, you'll pardon me if I always return to it, who don't scruple to denounce their mothers and fathers, their brothers and sisters, their lovers, their mistresses, and their best friends. Undoubtedly you know the Marquis de Sade was, under the Terror, a judge of the revolutionary tribunal. It happened by chance one day just his mother-in-law and father-in-law had to appear before him. Now the parents of his wife, especially his mother-in-law, had persecuted him without respite and without pity at the time of his marriage, had it stopped three times, and even wanted to have him imprisoned for life. Well, this splendid man, who was in a position to ruin them, saved them from the guillotine. 'I have had my revenge,' he said. He knew well that there was no better way of exasperating his mother-in-law who had made implacable efforts for thirty years to vilify him as an inhuman monster. It's a very French quality of mind, very delicate, very prudent, very chaste. The misfortune for the marquis," (he added: with a sharp pleased and jeering laugh,) was that this gesture got him accused of a suspect moderation. He was forthwith condemned to death—he who cheered up the old woman so well.

"Ah, the splendid eighteenth century!—it was still believing, even while parading liberal thought and scorn for morality. The blasphemies and ironies only proved that religion had not yet lost its empire. Me, I no longer have anything to do in a world where there isn't any and I can't live [fol. 95] in it any longer. That's why I do everything I

can to bring back religion in Europe. That surprises you? (It had surprised me for a moment, though I

(page 315) remembered that he had entertained Jacques Maritain, Aldous Huxley, and Monsignor Darcy.) I noticed very late that I had been guilty of a great error which was almost fatal to me. I woke up one fine morning with the slightly consoling consciousness that the catholic church of the Middle Ages had followed the road of the political good friend, as well for me as for her, when she had all the heretics burned. She knew well that, from the moment when one placed seriously in doubt a single one of her articles of faith, from the moment when one took it into his hand to reflect on these things by himself, it would all be up with religion. There would be nothing more than a complete fall. Formerly I didn't see this clearly, but to me this is more evident than the present hour. All these very intelligent rebels, on whom I sometimes dared to count to help me in my own affairs—as sympathetic as they appear to you—the church knows what she is doing when she suppresses them with a pitiless severity. From the moment when Luther escaped from the fold, the death-bell of the church tolled—this introduced not only the dismemberment of the catholic church but also the progressive weakening of the conception of a church—and I fear this continues up to the point where there will be no more cult, then no more true religion because one must know to accept as religious the rationalist and purely ethical sects like positivism in France and Unitarianism in your country. I can tell you, (he added, dropping his indignant tone with the lightness of good taste,) that my own little personal cult hardly exists any longer. There are only the frivolous students or the ridicu-
[fol. 96] lous pederasts who want to give me the honor of several rites fallen into decadence.

As I was saying to you, I didn't at first perceive where the success of these fine preachers led. I gave them lively encouragement in their blowing of hardier words. Moralists always offered me very rich opportunities. The great distinguish themselves by an educated mind and a firm and well disciplined character, who fall sometimes, in their thirst for power, with an admirable facility, into pride and fanaticism. Consciousness of virtue, you know, sometimes produces a kind of drunkenness upon which one comes by persuading himself, very willingly, that all the beings who differ from one haven't the right to persist in their errors; and when one

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permits himself to become fierce in wanting to make people virtuous, one ends by doing my work—like your neighbor M. Stryker.

(Page 316) (he added with a humorous smile), a true chip, embittered and tenacious of the old Protestant block. Then I started by delighting in this new kind of moralist, who otherwise as interesting as the spoilt prince of the church, showed himself with such a fresh and lively force and who gives us an unheard of ascendancy over the more unruly souls of their times—the Calvinists of the best sort were worthy of Torquemada, and the flowering of this protestant movement from the vulgar cannibalism of Robespierre charmed me to such a point that I did not at first realize that the worshipers of the supreme being no longer paid any attention to me. Then I couldn't get over my surprise and chagrin that I found myself in the presence of Marx, who—I concede it willingly—(he gave me a sly look) could pride himself on some beautiful, bigoted, and destroy-[fol. 97] ing strokes but who brought to men as religion only his dialectical materialism. You think wisely that I didn't find much amusement in eternally playing the role of Thesis in this entirely abstract theology which imposed on me the absurd obligation of being eaten, so to speak, periodically the forever virtuous 'antithesis'—an operation which compelled me, forcibly, to renounce all individuality. I tried to lend myself to it, and I didn't succeed: here I was suddenly embroiled, entangled, engulfed in boring and interminable discussions which recalled Christian casuistry but which possessed neither the flexibility nor the grace. The worst is that these protagonists of Marxist morality didn't even take it seriously: they like and seek only power, an entirely secular power, which, although it dreams of a richer life for future humanity or complete subjugation, didn't leave me any more reason for existence.

In sum total, I emigrated to your country, where the tendencies are not yet developed to this fatal end. You have done such beautiful things in the business of strong morality, don't you know? The Mathers and Jonathan Edwards—about whom it seems to me you heard people speak with so much insight last summer—they were real titans. And to think that Aaron Burr was the grandson of Edwards. In my opinion, it's the most remarkable intellectual family in the United States. I don't know of a stronger quality of mind than this, although I believe this was said

a little after eighteen hundred. He visited me a great deal, Burr, when he lived in Europe. He became, in his last years, a veritable European.

[fol. 98] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 13th day of November in the year of our Lord one thousand nine hundred and forty-seven, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding; John Ludden, Clerk.

THE PEOPLE &c., Respondent,

ag'st

DOUBLEDAY & COMPANY, INC., Appellant

REMITTITUR—November 14, 1947

Be It Remembered, That on the sixth day of August in the year of our Lord one thousand nine hundred and forty-seven, Doubleday & Company, Inc., the appellant in this cause, came here unto the Court of Appeals, by Satterlee, Warfield & Stephens, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed [fol. 99] as aforesaid, are hereto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Whitney North Seymour, of counsel for the appellant, and by Mr. Whitman Knapp, of counsel for the respondent, and after due deliveration had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the

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United States, viz: The defendant argued that its conviction violated the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the conviction aforesaid did not violate the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which rec-
[fols. 100-118] ord now remains in the said Court of Special Sessions before the Justices thereof, &c.

John Ludden, Chief of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, November 13, 1947.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 119] SUPREME COURT OF THE UNITED STATES

DOUBLEDAY & COMPANY, INC., Appellant,

vs.

PEOPLE OF THE STATE OF NEW YORK

ORDER ALLOWING APPEAL

The appellant in the above-entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a judgment made and ren-

dered in the above-entitled cause by the Court of Appeals of the State of New York on November 13, 1947, affirming the judgments of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, rendered May 16, 1947 and of the Court of Special Sessions of the City of New York rendered November 27, 1946, and from each and every part of said judgment of the Court of Appeals of the State of New York, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

[fol. 120] It Is Now Hereby Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Appeals of the State of New York in the above-entitled cause as provided by law, and it is further ordered that the Clerk of the Court of Special Sessions of the City of New York shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days from this date.

And It Is Further Ordered that security for costs on appeal be fixed in the sum of $1,000.00.

Dated: January 9th, 1948.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fol. 121] Supreme Court of the United States

[Title omitted]

Petition for Appeal

To the Honorable the Supreme Court of the United States:

Considering itself aggrieved by the final decision of the Court of Appeals of the State of New York in the above entitled cause, the appellant herein, Doubleday & Company, Inc., hereby prays that an appeal be allowed to the Supreme

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Court of the United States herein, and for an order fixing the amount of the bond as security for costs thereon.

Assignment of Errors

And the said Doubleday & Company, Inc. assigns the following errors in the record and proceedings in the said case:

1. The Court of Appeals of the State of New York erred in holding that subdivision 1 of section 1141 of the Penal Law of the State of New York, as construed and applied to appellant, is not void as violative of appellant's rights under the due process clause of the Fourteenth Amendment because it abridges appellant's right to freedoms of speech and of the press.

[fol. 122] 2. The Court of Appeals of the State of New York erred in holding that subdivision 1 of section 1141 of the Penal Law of the State of New York, as construed and applied to appellant, did not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment.

3. The Court of Appeals of the State of New York erred in holding that appellant's conviction and sentence under subdivision 1 of section 1141 of the Penal Law of the State of New York was not unconstitutional, illegal, void and of no effect under the due process clause of the Fourteenth Amendment.

4. The Court of Appeals of the State of New York erred in affirming the judgments of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department and of the Court of Special Sessions of the City of New York.

Prayer for Reversal

For which errors the appellant, Doubleday & Company, Inc., prays that the said judgment of the Court of Appeals of the State of New York, dated November 13, 1947, affirming the judgments of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and of the Court of Special Sessions of the City of New York, be reversed and a judgment rendered in favor of the

said appellant setting aside its conviction and directing the cancellation and the remission of the fine levied against it, and for costs and for all other proper relief.

Dated: January 5, 1948.

(Signed) Whitney North Seymour, Counsel for Appellant.

[fols. 123-125] Citation in usual form omitted in printing.

[fols. 126-128] Bond on appeal for $1,000.00 approved and filed; omitted in printing.

[fol. 129] Supreme Court of the United States

[Title omitted]

Stipulation as to Record on Appeal

Pursuant to the provisions of Paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, It Is Hereby Stipulated And Agreed by and between counsel for the respective parties hereto that the portions of the record to be included in the transcript to be filed in the Supreme Court of the United States, pursuant to an appeal duly allowed in the above entitled cause, shall include the following, to wit:

1. Informations numbered 3176 and 3177 filed in the Court of Special Sessions of the City of New York on July 24, 1946, together with endorsements on said informations.

2. Official transcript of the minutes of the proceedings before the Court of Special Sessions of the City of New York on October 29, 1946.

3. Official transcript of the minutes of the proceedings before the Court of Special Sessions of the City of New York on November 27, 1946.

4. All exhibits received in evidence at the trial.

5. Dissenting opinion of Mr. Justice Perlman.

[fol. 130] 6. Extracts from minutes of the Clerk of the Court of Special Sessions of the City of New York as to Informations Nos. 3176 and 3177.

7. Notices of appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial

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Department from the judgments of the Court of Special Sessions of the City of New York.

8. Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated May 16, 1947.

9. Certificate of Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, dated June 13, 1947.

10. Notice of appeal to the Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

11. Remittitur of the Court of Appeals of the State of New York, dated November 13, 1947.

12. Appellant's statement as to jurisdiction.

13. Appellant's petition for appeal, assignment of errors and prayer for reversal.

14. Order allowing appeal.

15. Citation issued upon appeal.

16. Appellant's statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

17. Proof of service of foregoing papers numbered 12, 13, 14, 15, and 16.

18. Bond for costs.

19. This stipulation.

Said transcript to be prepared by the Clerk of the Court of Special Sessions of the City of New York as required by [fol. 131] law and by the Rules of the Supreme Court of the United States and to be filed in the office of the Supreme Court of the United States at Washington, D. C., on or before the return day of the citation.

Dated, January 12, 1948.

Whitney North Seymour, Counsel for Appellant; Frank S. Hogan, Counsel for Appellee, by Whitman Knapp.

[fols. 132-133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed January 19, 1948

1. Now comes the appellant in the above entitled cause and, for its statement of points upon which it intends to rely in its appeal to this Court, adopts the points contained in its assignment of errors heretofore filed herein.

2. Appellant designates the entire record filed in this Court as necessary for the consideration of the foregoing points. Pursuant to the attached stipulation, which is hereby expressly made a part hereof and which has been executed by counsel for the respective parties hereto, said appellant designates as parts of the record to be printed, all of said record except People's Exhibit 1, which is a book entitled "Memoirs of Hecate County," by Edmund Wilson.

Dated, January 12, 1948.

Whitney North Seymour, Counsel for Appellant.

[fol. 135] Service of above statement and designation accepted and acknowledged this 12 day of January, 1948.

Frank S. Hogan, District Attorney of the County of New York, State of New York.

[fol. 136] SUPREME COURT OF THE UNITED STATES

STIPULATION

It Is Hereby Stipulated And Agreed by and between counsel for the respective parties hereto, as follows:

1. The Clerk shall print the entire record filed in this Court except People's Exhibit 1, which is a book entitled "Memoirs of Hecate County", by Edmund Wilson.

2. Either of the parties may refer to and quote in its brief or argument any part of said exhibit and may supply printed copies thereof as a supplement to its brief.

Dated, January 12, 1948.

Whitney North Seymour, Counsel for Appellant; Frank S. Hogan, Counsel for Appellee, by Whitman Knapp.

[fol. 136a] [File endorsement omitted.]

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[fol. 137] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 15, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed on Cover:] File No. 52,769. New York, Court of Appeals. Term No. 539. Doubleday & Company, Inc., Appellant, vs. People of the State of New York. Filed January 19, 1948. Term No. 539 O. T. 1947.